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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

23 Cr. 251 (AKH)

5 CHARLIE JAVICE, OLIVIER AMAR,

6 Defendants.

Conference

7
8 New York, N.Y.
September 26, 2023
9 2:37 p.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS

15 United States Attorney for the
Southern District of New York

16 BY: DINA McLEOD, ESQ.

MICAH F. FERGENSON, ESQ.

17 Assistant United States Attorneys

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21 KOBRE & KIM LLP

Attorneys for Defendant Olivier Amar

22 BY: SEAN S. BUCKLEY, ESQ.

STEVEN G. KOBRE, ESQ.

23 ALEXANDRIA E. SWETTE, ESQ.

24 ALSO PRESENT: KRISTY J. GREENBERG, ESQ., Hogan Lovells US LLP
Attorney for nonparty JPMorgan Chase

25 ALSO PRESENT: HARRY MORAN, Intern, USAO

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(Case called)

THE DEPUTY CLERK: Counsel, please state your appearances for the record.

MS. McLEOD: Good afternoon, your Honor. Dina McLeod and Micah Fergenson for the government, and with us at counsel table is our intern, Harry Moran.

THE COURT: Good afternoon, all.

MR. SPIRO: Good afternoon, your Honor. This is Alex Spiro. I'm joined by Maaren Shah and Sam Nitze on behalf of my client.

MR. BUCKLEY: Good afternoon, your Honor. Sean Buckley, Steve Kobre, and Alexandria Swette on behalf of Mr. Amar, who is seated at counsel table to my right.

THE COURT: How do you do, all.

First of all, I have a strict rule about repetitive letters. Requiring a joint letter is there for a purpose. It's to get an agenda, what's agreed and what's not agreed. It's not intended to carry on extensive debate, nor invite rejoinders and replies and sur-replies and sur-rejoinders. I'm not able to deal with this. It violates my orders, and it should not be repeated. I have not read all this barrage of correspondence, the last of which came in last night, and I cannot deal with it in that fashion. So we'll deal with it fresh. No agreements, nothing.

First, I'll ask Ms. McLeod to tell me how close she is

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1 to finishing her production.

2 MS. McLEOD: Yes, your Honor. So since the last
3 conference, the government—sorry. Let me get out my
4 statistics.

5 The government has made a number of productions. We
6 are on pace to meet the Court's deadline in October. We have
7 been in contact with JPMorgan Chase about their production
8 schedule. We understand that they understand the Court's
9 deadline as well. They were given the transcript of the last
10 conference, and they are on pace to meet that production
11 schedule. Their deadline for production is mid-October, and
12 that is also when they are expected to finish the privilege log
13 productions. JPMorgan Chase has been complying with your
14 Honor's directive to produce privilege logs every two to three
15 weeks since the last conference. They have produced four
16 privilege logs thus far, which total over 7,000 entries on the
17 four privilege logs combined. So we expect that the deadline
18 set by the Court will be met. We are proceeding apace.
19 Productions are proceeding on schedule. On at least one of the
20 meet-and-confers with defense counsel for both defendants, we
21 updated them on this. And so we've been trying to keep them in
22 the loop as much as possible on what we're expecting from
23 JPMorgan Chase both in terms of timing and volume,
24 understanding that that—

25 THE COURT: Tell me about the process. How does it

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1 work?

2 MS. McLEOD: The process from JPMorgan Chase's end?

3 THE COURT: You get electronic document production
4 from JPMorgan Chase.

5 MS. McLEOD: Yes.

6 THE COURT: What do you do with it?

7 MS. McLEOD: So they provide us with what's called a
8 load file, which means it's not a file that you can just click
9 open like a document. It's meant to be loaded onto an
10 e-discovery platform. And so once we get the load file, we
11 send it to a vendor, an e-discovery vendor, and then that
12 vendor loads it onto the platform and then Bates stamps the
13 production. Usually once there's a critical mass of documents,
14 we finalize the production to go out to defense counsel,
15 defense counsel will send us drives that are large enough to
16 fit the productions, because these are hundreds of thousands of
17 documents sometimes, and so we then load the productions that
18 are Bates stamped and provide it to defense counsel and—

19 THE COURT: So to understand it, you are turning over
20 everything you receive from JPMorgan Chase.

21 MS. McLEOD: Correct, your Honor.

22 THE COURT: You're not holding anything back.

23 MS. McLEOD: That's correct.

24 THE COURT: So there are two issues I think that arise
25 with respect to the production. One is the issue of the number

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1 of custodians whose files must be searched, and the second is
2 the issue of privilege. We'll take those up. Not this moment.

3 So you're going to be finished by October 13? You'll
4 be finished by October 13.

5 MS. McLEOD: JPMorgan Chase is finishing their
6 production by that date. We anticipate that our production
7 will be complete by the date of the conference, which is
8 October 24th, I believe. So that's what we're shooting for.

9 THE COURT: You told me two to three weeks after they
10 finish. If they finish by October 13, you need another two to
11 three weeks, and it may be that we have to push back that
12 conference so it doesn't coincide too closely with your
13 delivery of the production.

14 MS. McLEOD: That's possible, your Honor.

15 THE COURT: On your side, you want to have a
16 declaration by them with regard to an advice of counsel
17 defense, and they resisted on the grounds that they don't have
18 to do it until certainly after they finish reading your
19 discovery.

20 MS. McLEOD: Yes, your Honor. We would like—along
21 with the privilege issues being resolved, we would like the
22 Court at some point to set a date for the notice of advice of
23 counsel and also the documents and bases for the advice of
24 counsel, because as your Honor knows, if there is an advice of
25 counsel claim, that will require its own discovery on the

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1 government's end, and so sort of all in the interest of
2 efficiency and wrapping this all up into one, I think the
3 government's view is it makes sense to have some sort of
4 orderly date by which they have to provide the advice of
5 counsel and then we can engage on—we may be able to engage on
6 that directly. If not, you know, there may be discovery issues
7 to bring to the Court, but we would ask the Court—

8 THE COURT: Per Rule 16(b)(1)(A)?

9 MS. McLEOD: I believe that's right, your Honor.

10 THE COURT: Just read the book.

11 MS. McLEOD: Cocounsel is pulling the book for me.

12 But yes, we sent them a written letter outlining our request,
13 and then as laid out in the joint letter, defense counsel
14 stated that they were aware of certain authorities indicating
15 that pretrial notice may be required but declined to set a
16 date, and so long story short, we would just ask for a date on
17 that.

18 THE COURT: So three issues that are open is the issue
19 of custodians, that more have to be nominated than have been;
20 the issue of privilege, where the defendants have the right to
21 require rulings on what documents have been withheld from the
22 government; and the issue of the date for notice of an advice
23 of counsel defense. And those are the three things before us.

24 MS. McLEOD: That's right, your Honor.

25 THE COURT: Are there any others, Mr. Spiro?

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1 MR. SPIRO: As I indicated this morning, I do need to
2 briefly respond to some—

3 THE COURT: No. I didn't ask that question.

4 Are there any other issues we need to talk about?

5 MR. SPIRO: Discovery generally and those issues is
6 sufficient, yes.

7 THE COURT: What do you mean by discovery generally?

8 MR. SPIRO: Well, I just don't want to leave the
9 government's assertion what they've been doing discoverywise—

10 THE COURT: We have time to discuss it, but I want to
11 know what issues there are to be ruled on.

12 MR. SPIRO: Those three issues. I don't think the
13 final one they raised regarding reciprocal discovery is right,
14 given they haven't turned over a single document since the last
15 court appearance.

16 THE COURT: So no further issues.

17 Do you have any further issues, Mr. Buckley?

18 MR. BUCKLEY: No, your Honor.

19 THE COURT: I'll hear you, Mr. Buckley, or Mr. Spiro,
20 on the issue of additional custodians.

21 MR. SPIRO: Your Honor, just to take a step back
22 regarding the discovery, because I need to—

23 THE COURT: No, don't take a step back.

24 MR. SPIRO: I'll take a step forward then, your Honor.

25 When we last were before the Court, the Court issued a

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1 directive that we send a list of custodians to the government
2 and that they meet and confer and respond. The government
3 failed to do that. They didn't respond to our request for
4 custodians. And that's where that stands. Because JPMorgan
5 Chase has been driving this entire process, they are sitting
6 with a subpoena now for almost a year. They have not turned
7 over a single meaningful internal correspondence; they haven't
8 turned over one single document since we were last in court,
9 not one document, when you, your Honor, told them many times,
10 in many different ways, that you were disappointed at the
11 speed, that you wanted JPMorgan advised of that.

12 THE COURT: Does this have anything to do with
13 custodians?

14 MR. SPIRO: It does, because they didn't respond to
15 that either.

16 THE COURT: I understand from the government's
17 representation that JPMorgan Chase's production will be
18 finished by October 13. I take the representation as it's
19 stated. It's been insufficient to now, and they'll have to
20 hurry up.

21 MR. SPIRO: So amongst the custodians listed by
22 JPMorgan, which, again, was just handed to the government, not
23 procured in any meaningful way. They have a support staff
24 email exchange, a recruiting email exchange, monitoring; none
25 of the important people that we would need the email inboxes

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1 of, virtually none, are searched or provided to the government.

2 So just as—

3 THE COURT: You gave them a list of people.

4 MR. SPIRO: We did, and the government did not even
5 respond to that list.

6 THE COURT: What is the government response,
7 Ms. McLeod?

8 MS. McLEOD: That's not accurate.

9 THE COURT: I'll assume that nothing anybody says is
10 accurate until I verify it. What's your response?

11 MS. McLEOD: We had a phone call on September 7th with
12 the parties, with defense counsel. On that phone call, the
13 question of the custodian list was raised, and we did not
14 refuse to engage. What we said was, to the extent that you are
15 telling us what to do with our grand jury subpoena, telling us
16 that we have to add custodians to a grand jury subpoena to
17 which you are not a party, that request is denied, and you
18 may --

19 THE COURT: You're saying you're not doing anything
20 more with custodians.

21 MS. McLEOD: We are not agreeing to their request that
22 we have to do anything related to the custodian list.

23 THE COURT: Can I see the list, Mr. Spiro.

24 MR. SPIRO: We will pass up a copy to the Court.

25 THE COURT: I'll mark this Exhibit 1 to the session.

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1 How many people are on Exhibit A?

2 MS. McLEOD: Approximately 69, your Honor.

3 THE COURT: And the government says it's not going to
4 ask JPMorgan to do any research with regard to these
5 custodians, right?

6 MS. McLEOD: What we told them is, to the extent they
7 are telling us how to deal with the subpoena—so the answer is
8 no, correct, that's correct, your Honor.

9 THE COURT: Okay. So we're finished with custodians.
10 If I rule in your favor, you're finished with custodians.

11 MS. McLEOD: That's right, your Honor.

12 THE COURT: So the question to you, Mr. Spiro, is:
13 What is the government's obligation to investigate information
14 at the request of a defendant?

15 MR. SPIRO: Yes, your Honor. Beyond the U.S.
16 Attorney's manual and their ethical obligations, the Court,
17 from our perspective, instructed that, a directive just as any
18 other order.

19 THE COURT: I'm just trying to resolve disputes, so I
20 want to know what the law is. I'm speaking without any
21 research, without any briefing. Now that the issue has been
22 put to me, I have to look at the law. What does the law
23 require?

24 MR. SPIRO: The law requires—

25 THE COURT: Do you want an opportunity to brief this

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1 issue? I've never come across this issue before, whether or
2 not the government has an obligation to investigate certain
3 names given to them by the defendant.

4 MR. SPIRO: Yes, your Honor. I mean, just so that the
5 Court is aware, okay, because I understand 69 names and they're
6 answering in sort of high-level responses, I think it's
7 incumbent upon me to just point out, the names on this list
8 include the people that were Ms. Javice's direct supervisor,
9 the person who negotiated the deal, the person who was the
10 strategist that defined and depicted the business case for
11 JPMorgan. These are not loose ends. They worked with JPMorgan
12 to bring this case.

13 THE COURT: So one suggestion that I have is to state
14 the purpose for each of these names or the rationale for each
15 of these names.

16 MR. SPIRO: Then perhaps, given the Court's comments,
17 we could provide a letter to the Court indicating the reason
18 why we need these custodian inboxes searched.

19 THE COURT: I don't want to have letters. So I'm
20 asking you to develop procedure with me and with Ms. McLeod.
21 As long as I can get consent, it's much better than making
22 rulings. You've given a list of 69 names. Do you know,
23 Ms. McLeod, the purpose of each name?

24 MS. McLEOD: I don't know the purpose of each name. I
25 will say, your Honor, that to—

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1 THE COURT: So the answer is that Mr. Spiro should
2 give you the rationale for each of these names, and then we'll
3 have a better basis and a better record.

4 MS. McLEOD: Your Honor, I think the issue is that
5 from the government's perspective, the defendants are
6 attempting to control the grand jury power.

7 THE COURT: I recognize. But let's say, for sake of
8 argument, that one name, Mark D. Goldstein, let us say, has
9 information that is important for the defendants' defense,
10 either by way of denial or affirmative defense. Would the
11 government have an obligation to look into that?

12 MS. McLEOD: The government's obligation is to turn
13 over the Rule 16 in our possession. That's what we're entitled
14 to do. Just to put a finer point on this, the defendants have
15 a means under the rules if they want to seek this information.
16 That is a Rule 17 subpoena. So if—

17 THE COURT: And they can say everybody—

18 MS. McLEOD: So Mr. Spiro, to the extent that
19 Mr. Spiro is going to be writing something down about his
20 rationale for why all of the names are important, that sounds
21 like an application for a Rule 17 subpoena, and then he can
22 engage directly with JPMorgan Chase through that subpoena. The
23 government really—

24 THE COURT: All right. So you're telling me, no,
25 we're not looking anymore, notwithstanding any rationale that

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1 Mr. Spiro gives.

2 MS. McLEOD: What we're saying is JPMorgan Chase is in
3 compliance with the subpoena as far as we are concerned.

4 THE COURT: I put the question to you. You're saying
5 you're finished, you're not looking for more custodians, and
6 you're not looking for more rationale from Mr. Spiro.

7 MS. McLEOD: At this point, yes. But just to note the
8 timing issue—because I think that's relevant to the conference
9 in October—they essentially added 69 custodians. There's no
10 way JPMorgan Chase is going to meet that October deadline. So
11 among other things—

12 THE COURT: But that's a different issue.

13 MS. McLEOD: It is a different issue. I just want to
14 add that context. But yes, to answer your Honor's point,
15 that's correct. The rationale—

16 THE COURT: So I think I need briefing on this issue.

17 MS. McLEOD: So, your Honor, the government and
18 Mr. Spiro and counsel for Amar, Mr. Buckley and Mr. Kobre, did
19 brief this issue. It's in the letters.

20 THE COURT: I'm not—

21 MS. McLEOD: We can put the memos into a letter format
22 for your Honor, of course. But the substance is the same. The
23 letter from Javice was 10 pages long. So they've put in their
24 argument, and their argument does not have any law for your
25 Honor because there is no precedent for this.

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1 THE COURT: So what motion would you make to get this
2 information, Mr. Spiro?

3 MR. SPIRO: JPMorgan is serving as an arm of the
4 prosecution. They're working together.

5 THE COURT: What's your motion?

6 MR. SPIRO: It's a motion to compel them to comply
7 with the Rule 16 and other discovery obligations.

8 THE COURT: So why don't you make that motion.

9 MR. SPIRO: Sure.

10 THE COURT: And we will fix dates. Let me finish
11 today's session.

12 MS. McLEOD: Yes, your Honor.

13 THE COURT: That would put the issue to me to have a
14 ruling.

15 MR. BUCKLEY: Judge, Sean Buckley on behalf of
16 Mr. Amar. The only other thing I would add to this dialogue is
17 it would be a motion to find that JPMorgan is serving as the
18 arm of the prosecution and, in the alternative, that the
19 government is unwilling to go out and collect additional
20 custodians, the issuance of Rule 17 subpoenas.

21 THE COURT: Well, if you want to issue a Rule 17
22 subpoena, I can do that too.

23 MR. SPIRO: Well, your Honor, if I may just—

24 THE COURT: I suspect it's premature.

25 MR. SPIRO: That's exactly what I was about to say,

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1 your Honor. It's not only premature, but on multiple occasions
2 in front of your Honor—in fact, at both meaningful discovery
3 conferences, at one I said we can prepare one immediately for
4 your Honor, and government and the Court had a colloquy, and it
5 was deemed not to be necessary because at least there would be
6 a good-faith meeting of their obligations to provide this
7 stuff. At the last court appearance, your Honor said don't
8 invite them to do their own subpoena because it's going to take
9 more time. Ms. McLeod said that's fair.

10 THE COURT: We're where we are right now, so we have
11 to focus on what needs to be done. If you want something, you
12 have to make a motion. I'm not going to be making rulings that
13 anybody is an arm of anybody else. But if you have a motion to
14 compel production, that's a legitimate motion and I'll hear it.

15 MR. SPIRO: Thank you, Judge.

16 THE COURT: That takes care of the custodians issue
17 right now.

18 Let's do the issue of privilege. Defendants contend
19 that JPMorgan production is not finished until it produces the
20 documents it's withholding on the basis of privilege or unless
21 I sustain privilege. The government is arguing, as it has
22 argued with custodians, that it does not have to do the work of
23 defendants, doesn't have to investigate for defendants, and
24 when the government is satisfied with the privilege logs,
25 that's the end of it.

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1 So this too has to be briefed, and it's in the form of
2 a motion to compel production. So one branch of the motion
3 would be to set up court dates and procedures to enable rulings
4 on the attorney-client privilege issues. Do I have it right,
5 Mr. Spiro?

6 MR. SPIRO: I think that that is a way to proceed.
7 When I review the transcript from the last court appearance,
8 the way I read the transcript is that the government did not
9 object to what your Honor had set the date for.

10 THE COURT: They're objecting now. So whether they
11 objected before or not is not interesting to me. I was working
12 on a consensual basis.

13 MR. SPIRO: And I very much appreciated your Honor's
14 sentiment during that hearing. The transcript, to my mind,
15 speaks for itself.

16 THE COURT: Probably so, as all transcripts do. But
17 right now we have objections, and we have to rule on the
18 objections. So one branch would be a motion to compel
19 production, it would be to require the coming forward of
20 JPMorgan Chase with all documents without a ruling by the
21 Court. And the procedure I would use, which I don't think you
22 need to comment on, is to have a sample. I've done this
23 before. So the proponent seeking the document will call out
24 various numbers—five, ten, whatever we agree to—and I would
25 look at those documents and make rulings, and then that would

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1 probably be the basis for substantial agreements and maybe
2 resolve all the issues, or maybe not. So if I rule in favor of
3 defendants, that will be the procedure. If I rule in favor of
4 the government, the production will be when the government says
5 it's over.

6 Okay. So next one is the date for advice of counsel.
7 My observation on this particular point is that that defense is
8 not dependent on anything the government produces. One says it
9 was advice of counsel, that defendant relied on his lawyer to
10 advise him about his conduct, so all the information is
11 controlled by the defendant and it does not depend on
12 information learned from the government. That's an initial
13 observation. I haven't read any briefs on this. If you'd like
14 to brief this, I'd be very happy to read it.

15 MR. SPIRO: We don't believe this issue is ripe, so if
16 the government makes a motion, we will of course respond, and
17 if the Court allows that at this stage, then we'll of course
18 respond to the motion, but—

19 THE COURT: I think you have a different issue because
20 the government is entitled to discovery if you say that, and I
21 don't mind waiting until the completion of the government's
22 discovery until we push forward on defenses.

23 MR. SPIRO: That would be our request, and as we
24 think—

25 THE COURT: I think the next status conference, we'll

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1 need to set a date.

2 Okay. So we have the motion to compel.

3 MR. BUCKLEY: Your Honor, understanding that we have a
4 status conference in October, the expectation is we are going
5 to receive a large document dump shortly before that
6 conference, so for us to be in a position to assess what is
7 contained in those documents and make a decision under
8 Rule 16(b) as to whether we want to affirmatively take the step
9 of asserting an advice of counsel defense, I just think the
10 window is going to be too narrow there, particularly given the
11 volume that we're expecting.

12 MS. McLEOD: Your Honor, I was just going to reiterate
13 that we agree with your Honor's point that whether an advice of
14 counsel claim is to be pursued is within the control of the
15 defendants. They are the ones who know whether they believe
16 they relied on advice of counsel, and we have raised that with
17 defense counsel, and so we do appreciate that the Court is
18 focused on the issue.

19 THE COURT: Mr. Spiro, when would you like to make
20 your motion? Do you want to talk to Mr. Buckley about that?
21 I'd like to have one motion from both of you.

22 MR. SPIRO: Understood, your Honor. I think that sort
23 of at inception, we understand the Court's position. When we
24 get additional rolling productions and rolling privilege logs,
25 we'll be able to make subsequent motions. We would like—we

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1 thought this issue was being addressed today. We would like to
2 move with all deliberate speed. As the Court knows, I didn't
3 want to waive speedy trial in this case. I was told we'd
4 receive everything by July. The reality is, we'd like to move
5 on this issue as soon as possible, but we would have to do so
6 with the understanding that when production is finished,
7 whenever that may be, that we would have the ability to reraise
8 certain issues. That's the conundrum I face now, having come
9 here to I thought address this issue today.

10 THE COURT: I don't really know what issues you're
11 talking about, but in my court you can raise issues any time
12 you want to. You don't need permission. How much time do you
13 need?

14 MR. SPIRO: Just a moment, your Honor, if that's okay?

15 THE COURT: Yes. I suggest the partners ought to
16 confer with the associates who will be doing the work.

17 MR. SPIRO: Two weeks, your Honor?

18 THE COURT: Can your associates comply with it?

19 MR. SPIRO: I hope so, your Honor.

20 MS. McLEOD: And your Honor, could we have two weeks?

21 THE COURT: Yes.

22 MS. McLEOD: Thank you.

23 THE COURT: But don't ask me for adjournments.

24 MS. McLEOD: Understood.

25 THE COURT: Two weeks from today comes out to

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1 October 10. Take till October 13 for defendants. The
2 government will have until October 27.

3 When was the next status conference?

4 MS. McLEOD: It's October 24th, I believe.

5 THE COURT: So we should push that off.

6 MS. McLEOD: One just procedural point on the briefing
7 is that the government is to respond, but we're not the ones
8 who were asserting the privilege, and so we wouldn't be able to
9 really respond substantively to the privilege claims, so—

10 THE COURT: Your point is that the government doesn't
11 have any further obligation. That's the point.

12 MS. McLEOD: Yes. And we can certainly brief that. I
13 just want to make clear that JPMorgan Chase is not involved in
14 this briefing schedule and they're the holders of the
15 privilege. And so that sort of like reraises the question
16 about how to get them into the case.

17 MR. SPIRO: Well, your Honor, JPMorgan Chase was
18 provided a copy of the transcript at the last appearance
19 ordering them to be here today. Surely they're here. They can
20 move to intervene if they need to if there's some issue that
21 they wish to raise.

22 THE COURT: As I see it, with this schedule, I'm not
23 going to make rulings on privilege. And just answering the
24 question that the government has a duty, if the government has
25 a duty, the next step will be to require JPMorgan Chase to

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1 bring documents to the courthouse. So if they want to object
2 and move to quash, there is no subpoena. They can't move to
3 quash. If they wish to object, they can. And if they would
4 like to have a 17(c) now asking for all documents withheld on
5 the basis of privilege, I'm sure the defendants could
6 accommodate them.

7 Is there a representative from Chase here?

8 MS. GREENBERG: Yes, your Honor.

9 THE COURT: Step forward.

10 What's your name?

11 MS. GREENBERG: Kristy Greenberg.

12 THE COURT: Take off your mask, please, Ms. Greenberg.

13 MS. GREENBERG: Kristy Greenberg from Hogan Lovells on
14 behalf of JPMorgan Chase.

15 THE COURT: If I rule in favor of the defense—namely,
16 that we have to inquire into the bases of privilege and make
17 rulings on the docket—what procedural steps should be
18 followed?

19 MS. GREENBERG: Your Honor, first and foremost, we
20 would want the opportunity to be heard. In particular, we have
21 certain—

22 THE COURT: I'm listening.

23 MS. GREENBERG: Yes. We have certain categories that
24 have been identified so far, a week ago from defense counsel,
25 and really it seems like the main issue that's been identified

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1 on privilege so far is with respect to one individual—Matt
2 Glaser. He was the chief legal officer and the chief
3 operational officer, so he had a dual role. Now JPMorgan Chase
4 has produced roughly 5,200 communications from Mr. Glaser
5 already, okay? We recognize that he was in this dual role,
6 wearing two hats, and so when he was not providing legal
7 advice, we agreed that those communications should be produced,
8 and we have done so. Where we've held back is where, in our
9 estimation, in review of these materials, he has been acting in
10 a legal capacity. So we would request the opportunity to be
11 heard to be able to explain how those distinctions had been
12 made to draw your Honor's attention to the relevant case law on
13 dual role in an attorney-client privilege context.

14 THE COURT: I understand when a lawyer acts as a
15 lawyer and gives legal advice in response to a question, that's
16 privilege; when the lawyer acts as a businessman, it's not
17 privilege. It's a hard issue.

18 MS. GREENBERG: Yes, your Honor. I think just in the
19 context it was provided, here we would want to provide more
20 information to your Honor about how we're drawing those
21 distinctions.

22 THE COURT: It means reviewing materials and hearing
23 argument *in camera*.

24 MS. GREENBERG: Yes, your Honor. That was my next
25 point. We would ask that your Honor review any such materials

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1 *in camera* so that those issues are not being raised in open
2 court.

3 THE COURT: Well, what I've done before is to require
4 all the documents brought to the courthouse and then we do a
5 sample, and the sampling would be papers on which Mr. Glaser's
6 name is present and the privilege is claimed. And I would read
7 in the document, or identify it. The privilege log, who wrote
8 it, who received it, the subject matter, and so forth, in a
9 manner disclosing privilege. And then I make a ruling. And
10 this provides me enough context already to see that. My ruling
11 would not disclose the contents of a document that is being
12 withheld. Now I understand that a party in your position would
13 have a right of appeal on these issues, so it would be
14 necessary to make a record, but the record is a document
15 itself, sealed. I don't see any difficulty in this. Now do
16 you need a Rule 17(c) subpoena that would in effect call for
17 the production of all documents withheld before doing this or
18 can we just do it?

19 MS. GREENBERG: Well, your Honor, under the procedures
20 in Rule 17, defense is entitled to information that is
21 relevant, specific, and admissible, and courts in this district
22 have clearly held that information that is privileged is not
23 admissible. So they can certainly seek specific information
24 that they deem to be admissible, but where we have privilege
25 calls, it would tee up this issue for your Honor. So we do

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1 think that process of going through Rule 17, for them to make
2 their showing, for us to be able to have the opportunity as a
3 nonparty victim to respond, and then to have those documents
4 before your Honor to review *in camera* is the proper procedure.

5 THE COURT: Why don't defendants issue a Rule 17(c)
6 subpoena that would describe all the documents that you wish to
7 have, as they've been described on a privilege log. You don't
8 have to repeat it. And I don't think you want necessarily,
9 Ms. Greenberg, reasoning in the public record why something is
10 relevant or not. You'll inquire and we'll inquire.

11 MS. GREENBERG: Rule 17 requires that there be some
12 showing, whether it's on the record or under seal before your
13 Honor, to identify if it's, again—

14 THE COURT: Ms. Greenberg, the first task in
15 regulating discovery is to see how much consensus I can get
16 without having to make rulings. So I'm asking you. If you
17 want to accept the technicalities, you'll have technicalities,
18 but you'll come out to the same thing. I can see why you want
19 a Rule 17 subpoena. That will give you the basis of appeal.
20 But I don't think you need something in writing because the
21 reasoning for that could be done document by document in the
22 way that I mentioned. If you think I'm wrong, tell me.

23 MS. GREENBERG: Your Honor, again, I think we would
24 just want to have an understanding of what showing the defense
25 is making in order to be able to meet the stringent

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1 requirements of Rule 17 so we can evaluate how to respond,
2 whether or not we would agree, as your Honor said, and there
3 can be—whether there can be areas for agreement or whether
4 there would be areas that we would oppose. So I think we would
5 ask that they follow the rule and make the proper showing.

6 THE COURT: This is my ruling. In view of the
7 complications of this case, of the extraordinary number of
8 documents that are potentially relevant, that are necessary for
9 a speedy adjudication of the issue of guilt or innocence, the
10 procedure will be this: If I rule that the government has an
11 additional burden to deal with the documents withheld from
12 Rule 16 discovery on the basis of privilege, then I will
13 require JPMorgan Chase to bring documents to the courthouse,
14 ready for ruling. A showing will have to be made—a showing
15 first as to whether or not there is privilege, and second, that
16 there is a right to the document under Rule 17. If the
17 question becomes too hard to deal with orally, we'll develop
18 another procedure for it. But the procedure you suggest,
19 Ms. Greenberg, would so complicate this proceeding and so
20 interfere with defendants' right to a speedy trial that I will
21 not adopt it.

22 What's the next issue?

23 MR. SPIRO: Nothing further I believe from the
24 defense. I think you've covered the issues today, your Honor.

25 MR. BUCKLEY: Yes. Thank you, Judge.

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1 THE COURT: Ms. McLeod.

2 MS. McLEOD: No further issues from the government. I
3 believe at the last conference we moved to exclude time until
4 the October 24th date, so there's no application on that point
5 today.

6 THE COURT: Right. You make it now till—oh, did I
7 set a date for a hearing? No, I didn't set it. November 2 at
8 2:30.

9 MS. McLEOD: November 2? Your Honor, would it be at
10 all possible to have a different day that week?

11 THE COURT: The only different date—it's a pretty
12 short time after I get the papers, and have argument. The only
13 other date that's possible is Friday, but I have other things
14 to do on Friday. I can do it the following week, but that's
15 not a good idea either. So unless there's an extraordinary
16 difficulty with November 2, we'll do it November 2 at 2:30.

17 MS. McLEOD: Okay. Understood, your Honor.

18 THE COURT: Is there a motion to exclude time?

19 MS. McLEOD: Yes, your Honor. The government would
20 move to exclude time from today until November 2nd in order for
21 the government to continue producing discovery, the defendants
22 to continue reviewing discovery, and for the parties to prepare
23 any relevant motions for your Honor.

24 THE COURT: Is there objection, Mr. Spiro?

25 MR. SPIRO: Your Honor, I'm not consenting to the

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1 application, but I understand that I'm between a rock and a
2 hard place, based on the way discovery has proceeded here, so—

3 THE COURT: The question is: Do you object?

4 MR. SPIRO: I do.

5 THE COURT: You do object.

6 How about you, Mr. Buckley?

7 MR. BUCKLEY: No objection, your Honor.

8 THE COURT: On the basis of Section 3161(h)(1)(B) and
9 in the interests of justice that will allow for an orderly
10 trial without surprise or without prejudice to the public, the
11 time between now and November 2, 2023, is excluded.

12 MS. McLEOD: Your Honor, one question: Is the
13 October 24th date still on the—

14 THE COURT: That's off.

15 MS. McLEOD: That's off.

16 THE COURT: Right.

17 MS. McLEOD: Okay. I got it.

18 THE COURT: That will give more time for the
19 defendants to process the production that will be made, and
20 we'll have both rulings on the issues that will be posed by the
21 motion and a status conference to decide how we go forward.
22 Among the issues that will be discussed will be the necessity
23 and timing of the defense of advice of counsel, or any other
24 defense, and whether or not there has to be any rulings on the
25 specificity of privilege.

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1 MS. McLEOD: Understood, your Honor.

2 THE COURT: Thank you, all.

3 ALL COUNSEL: Thank you.

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